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Supreme Court, U.S.
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No. 92-814

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

PEPPER BURNS INSULATION, INC.,
Petitioner,
v.
ARTCO CONTRACTING INCORPORATED,
Respondent.

BRIEF OF AMICI CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI BY AMERICAN SUBCONTRACTORS ASSOCIATION, INC. AMERICAN FIRE SPRINKLER ASSOCIATION, AMERICAN INSTITUTE OF STEEL CONSTRUCTION, ASSOCIATION OF THE WALL AND CEILING INDUSTRIES - INTERNATIONAL, INSULATION CONTRACTORS ASSOCIATION OF AMERICA, NATIONAL GLASS ASSOCIATION, NATIONAL INSULATION AND ABATEMENT CONTRACTORS ASSOCIATION, NATIONAL ROOFING CONTRACTORS ASSOCIATION, AND PAINTING AND DECORATING CONTRACTORS OF AMERICA

DAVID R. HENDRICK*
VICTORIA H. TOBIN
HENDRICK, SPANOS & PHILLIPS
1410 Peachtree Center Tower
230 Peachtree Street, N.W.
Atlanta, Georgia 30303
(404) 522-1410

*Counsel of Record for All *Amici Curiae*

DAVID B. RATTERMAN**
Goldberg & Simpson, P.S.C.
2800 First National Tower
Louisville, Kentucky 40202
(404) 522-4440

**Of Counsel for the American Institute of Steel Construction Only

Stein Printing Company, 2161 Monroe Drive, Atlanta, Georgia 30324 (404) 875-0421

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I. INTRODUCTION

The *Amici Curiae* join in submitting this Brief in support of the *Petition for Writ of Certiorari*, pursuant to Rule 37.2 of the United States Supreme Court Rules, upon the written consent of all parties.[1]

II. INTEREST OF THE AMICI

The several *Amici Curiae* joining in submission of this Brief are separate and independent construction industry trade associations whose memberships are comprised of businesses of all sizes which provide labor and materials in various sub-trade and specialty-trade areas on construction projects throughout the United States.[2] Constituent members of each *Amicus Curiae*

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[1] Letters from counsel for Petitioner and Respondent have been submitted to the Court as evidence of the parties' consent to the filing of the instant *Amicus* brief.

[2] (1) American Subcontractors Association, Inc. ("ASA")
1004 Duke Street
Alexandria, Virginia 22314-3512

ASA's membership consists of approximately 6,500 companies who generally function as subcontractors, suppliers, fabricators and manufacturers supplying labor, material and services to the construction industry.

(2) American Fire Sprinkler Association ("AFSA")
1325 Pegasus, Suite S220
Dallas, Texas 75238

AFSA's membership consists of approximately 600 companies who generally function as subcontractors,

suppliers, fabricators and manufacturers of fire protection systems for installation into construction projects.

(3) American Institute of Steel Construction ("AISC")
1 East Wacker Drive, Ste. 3100
Chicago, Illinois 60601-2001

AISC's membership consists of approximately 2,900 engineering professionals and fabricating companies who are involved in utilization of structural steel for construction projects.

(4) Association of the Wall and Ceiling Industries - International ("AWCI")
1600 Cameron Street, Ste. 200
Alexandria, Virginia 22314-2705

AWCI's membership of approximately 1,300 companies is involved generally in the performance of acoustical tile, drywall, lathing and plastering, and fireproofing construction trades.

(5) Insulation Contractors Association of America ("ICAA")
15819 Crabbs Branch Way
Rockville, Maryland 20855

ICAA's membership consist of approximately 350 members who are involved in the manufacture and installation of insulation materials on construction projects.

(6) National Glass Association ("NGA")
8200 Greensboro Drive, Ste. 302
McLean, Virginia 22102

NGA's membership of approximately 2,900 companies represent manufacturers, fabricators, and installers of glass and glazing systems on construction projects.

(7) National Insulation and Abatement Contractors Association ("NIACA")
99 Canal Center Place, Suite 222
Alexandria, Virginia 22314

often participate in the construction of federal public works projects, frequently at the "second tier" level where they are engaged as sub-subcontractors or suppliers to "first tier" subcontractors engaged directly by the prime contractors in privity with the government.

Most of the labor and materials required for construction of federal construction projects is generally provided by subcontractors and suppliers who do not have a direct contractual relationship with or recourse against the government or, indeed, even the prime contractor. Since mechanics' and materialmen's lien

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NIACA's membership consists of approximately 600 companies performing insulation and asbestos abatement work on construction projects.

(8) National Roofing Contractors Association ("NRCA")
10255 West Higgins Road
Rosemont, Illinois 60018

NRCA's membership of approximately 3,350 companies represents manufacturers, applicators and subcontractors involved in the installation of commercial and industrial roof systems.

(9) Painting and Decorating Contractors of America ("PDC")
3913 Old Lee Highway, Ste. 33B
Fairfax, Virginia 22030

PDC's membership of approximately 3,200 companies is involved as suppliers and applicators of coatings, paint and wall covering on construction projects.

rights do not attach to such public works, the only form of security for payment generally available to "second-tier" suppliers and subcontractors is afforded by payment bonds required under the Miller Act. 49 Stat. 793, as amended 80 Stat. 1139, 40 U.S.C. §270a - 270f. These statutory rights are significantly jeopardized by the United States Court of Appeals for the Fourth Circuit in its restrictive application of the written notice requirements under 40 U.S.C. §270b(a) to the instant case.[3]

Indeed, the sufficiency of notice is one of the most frequent sources of dispute concerning Miller Act payment bond claims, which often turn on whether this condition precedent to entitlement has been satisfied. Thus, for the substantial number of persons providing labor and materials for construction of virtually every federal public work, reasonableness, clarity and predictability in the application of this notice requirement are absolutely essential to preservation of the Miller Act protections created for their benefit. Unfortunately, the Fourth Circuit's restrictive interpretation in its decision below will substantially

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[3] *Pepper Burns Insulation, Inc. v. Artco Contracting, Incorporated*, 970 F.2d 1340 (4th Cir. 1992).

increase the difficulty of effecting timely and proper written notice and multiply the already significant risks of non-payment borne by second-tier subcontractors and suppliers.[4]

Accordingly, these associations and their constituent members join as *Amici Curiae* in support of the *Petition for Certiorari* seeking review of the decision of the United States Court of Appeals for the Fourth Circuit.

III. SUMMARY OF ARGUMENT

In effect, the Court of Appeals has held that a subcontractor or supplier who sends notice of its claim to the prime contractor in precise compliance with the notice requirements of the statute can be deprived of his right to proceed by the prime contractor's delay in accepting delivery of such notice.

This ruling has contravened the letter and spirit of the Miller Act, departed from principles of interpretation

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[4] The impact of the Fourth Circuit's decision will likely be felt far beyond its direct application to federal construction projects since virtually all of the states have enacted "Little Miller Act" legislation patterned after the Federal Miller Act. In construing the state versions of the act, state and federal courts alike have looked for guidance to cases construing the Federal Miller Act. Unless modified by this Court, therefore, the rule of construction laid down by the Fourth Circuit in the instant case has the potential to be applied by courts at every level to limit the access of countless subcontractors and suppliers to the protections of Miller Act legislation.

enunciated by this Court, contradicted the holdings of other federal courts addressing this issue, and generally increased confusion and uncertainty relative to the "giving written notice" requirement of 40 U.S.C. §270 b(a). The Fourth Circuit's restrictive ruling interprets this language to require actual receipt by the contractor within the statutory ninety day notice period, even when notice is "served" substantially in the manner directed by the statute. Not only is this view contrary to established legal principles, but it also will undercut the firm federal policy recognizing that the remedial purpose of the Miller Act requires that it be liberally interpreted in favor of the subcontractor and supplier claimants. Once written notice has been "giv[en]" via "service" by registered mail, as specified, the claimant has no further control over the timing of delivery and receipt. Ironically, the prime contractor then becomes the party in control of when the notice is actually received.

This was not the intent of Congress. Moreover, any benefit the decision may have in effectuating finality is overwhelmingly outweighed by the potentially devastating consequences for those whom the Act was intended to benefit.

IV. ARGUMENT OF *AMICI CURIAE*

A. THIS COURT SHOULD RESOLVE THE EXISTING CONFLICT AND CONFUSION REGARDING INTERPRETATION OF "NOTICE" FOR PURPOSES OF 40 U.S.C. §270b(a).

This Court has consistently recognized that the Miller Act requires a government contractor to post a surety payment bond "for the protection of all persons supplying labor and materials in the prosecution of the work provided for" in the contract. F.D. Rich Co., Inc. v. United States for the Use of Industrial Lumber Company, Inc., 417 U.S. 116, 118 (1974). Furthermore, this Court has recognized that the Miller Act is "highly remedial in nature" and is therefore "entitled to a liberal construction and application in order to properly effectuate the congressional intent to protect those whose labor and materials go into public projects." Clifford F. MacEvoy Co. v. United States for the Use and Benefit of Calvin Tomkins Co., 322 U.S. 102, 107; See also, J.W. Bateson Company, Inc. v. United States ex rel. Board of Trustees of the National Automatic Sprinkler Industry Pension Fund, 434 U.S. 586 (1978); Fleisher Engineering and Construction Co. v. United States for the Use and Benefit of Hallenbeck, 311 U.S.

15 (1940). The decision of the United States Court of Appeals for the Fourth Circuit below that the written notice required of second-tier subcontractors must actually be received by the prime contractor within the ninety-day period deviates from these well-established principles and contravenes the spirit, if not the letter, of applicable decisions of this Court.

The holding of this Court in Fleisher Engineering, does not compel the result reached in the Fourth Circuit opinion below. There, this Court opined that:

> In giving the statute a reasonable construction in order to effect its remedial purpose, we think that a distinction should be drawn between the provision explicitly stating the condition precedent to the right to sue and the provision as to the manner of serving notice. The structure of the statute indicates the distinction. The proviso, which defines the condition precedent to suit, states that the material-man or laborer "shall have a right of action upon the said payment bond upon giving written notice to said contractor" within ninety days from the date of final performance. The condition as thus expressed was fully met. Then the statute goes on to provide for the mode of service of the notice. "Such notice shall be served by mailing the same by registered mail, postage prepaid", or "in any manner" in which the United States marshal "is authorized by law to serve summons". We think that the purpose of this provision as to manner of service was to assure receipt of the

> notice, not to make the described method mandatory so as to deny right of suit when the required written notice within the specified time had actually been given and received. In the face of such receipt, the reason for a particular mode of service fails. It is not reasonable to suppose that Congress intended to insist upon an idle form. Rather, we think that Congress intended to provide a method which would afford sufficient proof of service when receipt of the required written notice was not shown.

311 U.S. 15, 18. Thus, where a claimant elects to use a mode of effecting notice other than that specified, the timeliness of the notice must be measured by when it was actually received since the claimant controlled when it would be received. However, when the claimant "gives written notice" in substantially the manner specified by "serving" it by a properly posted and addressed "registered mail" transmittal, the timeliness should rather be measured by the date of transmittal - the last act within the control of the claimant.

Furthermore, as set forth in the *Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit*, the decision of the Fourth Circuit evidences a growing split among the circuits with respect to the current state of the law regarding this critical issue

of measuring the timeliness of the notice required by 40 U.S.C. §240b(a).[5]

Unless the Fourth Circuit's restrictive application is overturned, second-tier subcontractors and suppliers on federal construction projects will henceforth be left with only conjecture and speculation as to when they must mail written notice to assure that it will actually be received by the prime contractor within the ninety-day notice period.

B. THE DECISION BELOW CONTRAVENES THE REMEDIAL PURPOSE OF THE MILLER ACT AS WELL AS ITS LETTER AND SPIRIT.

The protection of a Miller Act payment bond extends no further than the second tier level of subcontractors and suppliers. J.W. Bateson Company, Inc. v. United States ex rel. Board of Trustees of the National Automatic Sprinkler Industry Pension Fund, 434 U.S. 586 (1978). Further, the Miller Act requires

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[5] The decision below runs contrary to rulings by the United States District Court for the Eastern District of New York, which was affirmed by the United States Second Circuit Court of Appeals, and the United States District Court for the Eastern District of Louisiana. On the other hand, several United States District Courts in other circuits have reached results similar to that of the Fourth Circuit in its decision below.

that such persons shall have a right of action upon the payment bond only "upon giving written notice" to the contractor "within ninety days" from the date on which they last supplied labor or materials for which claim is made. 40 U.S.C. §270b(a) (emphasis added). The statute further provides that "[s]uch notice shall be served by mailing the same by registered mail, postage pre-paid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence. . . ." Id. (emphasis added). Since the Miller Act must be liberally construed to further its purpose of protecting subcontractors and suppliers, the plain meaning of this notice requirement is that the claimant must only "give" the written notice by "serving" it by mail in the manner precisely specified by the statute within the ninety-day period within which such notice must be given.

The mode of service expressly provided by Congress is calculated to permit clear proof of the date upon which such notice was served by deposit of the notice with the U.S. Postal Service. The language clearly suggests an intention to be guided by the procedural rule generally governing "service" of papers in civil actions

which provides that "service by mail is complete upon mailing." Rule 5(b), Federal Rules of Civil Procedure.

Indeed, once the second-tier subcontractor or supplier has given service of such written notice in the manner prescribed, it has done all that it can do to assure that such notice will be promptly delivered. The time within which delivery and receipt of such notice will actually be effected is then totally beyond the subcontractor's control. Even more importantly, the time ultimately consumed between the date the subcontractor deposits a properly posted and addressed letter by registered mail[6] with the U.S. Postal Service until its actual receipt by the contractor cannot be anticipated or predicted.[7] Under the Fourth Circuit's

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[6] In all material respects, mailing by "registered" or "certified" mail is virtually identical. See, 39 C.F.R. §3001, Subpt. C, App A 5.01, 14.01. The only difference is the way in which the matter is received by the post office and the optional indemnity in case of damage or loss available to the senders of registered mail.

[7] The timing of such transmission and delivery will be controlled by such factors as:

(a) the time usually required by the U.S. Postal Service to specially receive, process and ultimately deliver the registered mail transmittal to the addressee;

(b) to the extent that the contractor employs an unattended mail box or a post office box for delivery of mail, the additional time that will be consumed

restrictive interpretation, the timeliness of such written notice is left entirely in the control of the prime contractor who may elect to defer actual receipt simply by delaying pick up of the registered mail transmittal at the post office. The fox is left fully in charge of the hen house!

Given the statute's clear remedial intent to protect payment rights of subcontractors and suppliers, it is inconceivable that Congress intended to burden such claimants at the second-tier level with this additional, unmanageable risk of the unknown. In its apparent zeal to protect the interests of prime contractors by providing "a date certain after which they are no longer at risk of liability to second-tier subcontractors", the Fourth Circuit's ruling below would effectively deny to second-tier subcontractors and suppliers a "date certain" by which the required written notice must be served by properly addressing and posting it in the manner

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until the contractor elects to pick up such a registered mail transmittal at the post office once the post office has left notice in the contractor's box that such a letter is being held for acknowledgement of receipt and delivery; and

(c) any other additional, unforeseeable delays incurred in the delivery or transmittal process.

specified. Clearly, the purpose of the Miller Act is better served by only requiring that such claimants must give notice by serving it in the manner provided by depositing it in the mail with the U.S. Postal Service within the specified ninety-day period.

C. THE DECISION BELOW DOES NOT EFFECTIVELY ADDRESS THE COURT'S CONCERNS REGARDING FINALITY.

The Fourth Circuit's concerns about prime contractors' ability to protect themselves from duplicate liability to second-tier subcontractors can be addressed effectively in a number of other ways more consonant with the liberal application of the Miller Act payment bond protection. Indeed, this Court has previously noted that the relatively few first-tier subcontractors performing work on construction projects are generally well-known to the prime contractor. Consequently, "[i]t is easy for the prime contractor to secure himself against loss by requiring the subcontractors to give security bond, or otherwise, for the payment of those who contract directly with the subcontractors." F.D. Rich Co., Inc. v. United States for the Use of Industrial Lumber Company, Inc., 417 U.S. 116, 123 (1974), quoting Clifford F. MacEvoy Co. v. United States for the Use and Benefit of Calvin

Tomkins Co., 322 U.S. 102, 110 (1944). Indeed, the prime contractor is in the best position to protect itself from claims by second-tier subcontractors and suppliers by contractually requiring the first-tier subcontractors to identify and attest to the payment status of all second-tier subcontractors and suppliers. Additionally, the prime contractor may require appropriate waivers and releases from such second-tier subcontractors and suppliers as a pre-condition to releasing payment to the first-tier subcontractors.

In any case, since a prime contractor is often not fully aware of when certain second-tier subcontractors and suppliers have ceased providing labor and materials, it is generally not even aware of when the ninety-day notice period commences to run regarding the numerous second-tier subcontractors and suppliers. Thus, the Fourth Circuit's suggestion that the prime contractor should be able to protect itself by waiting ninety days before release of payment to the first-tier subcontractors is simply erroneous. Instead, proper administration of the first-tier subcontracts by the prime contractor affords the prime contractor the greatest degree of protection of unanticipated liability to unpaid second-tier subcontractors and suppliers.

Finally, the realities of the payment process on most federal construction projects further underscore the unreasonableness and impracticality of the Fourth Circuit's interpretation of the written notice requirement. The payment process itself can easily consume much of the ninety-day notice period after the last labor or material is provided before the subcontractor has reason to believe the contractor has defaulted on his payment obligation. Thus, the claimant may have to wait well into the ninety-day notice period before it may even reasonably determine whether it must give notice of its claim in order to preserve its rights under the bond.[8]

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[8] On most federal construction projects, progress payments are made on a monthly basis until completion, at which time final payment is made. Generally, the prime contractor requires its subcontractors (and, in turn, their sub-subcontractors and suppliers) to submit payment applications for work and materials provided during a particular monthly payment period in order to be included in the prime contractor's payment application to the government for that month. Thus, hypothetically, a second-tier subcontractor who provided its last labor and materials during a particular month would not initiate its payment request until the end of the payment period.

At the end of the month, the prime contractor typically gathers all subcontractor and supplier payment requests for that period and incorporates such requests into its own payment application to be submitted to the government. From the date of submission of that application at the end of the month, the government is afforded from fourteen (14) to thirty (30) days from receipt of the prime contractor's payment application under the Prompt Payment Act to make payment under the prime contract.

On the other hand, under the ruling of the Fourth Circuit below, the claimant assumes the full risk of estimating how long transmission and delivery of a properly posted and addressed written notice will take in order to be received by the contractor within ninety (90) days of its last work on the project. In an abundance of caution, then, the claimant would have to allow two to three weeks for actual delivery and receipt of such notice

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39 U.S.C. §3903(a)(1) and (a)(6) (confirmed). Sections 4(e) and 10(a)(1) and (3), OMB Circular No. A-125, 54 FR 52700, December 21, 1989, ¶26,840 *Government Contractors Reporter*, Vol. 5 (Commerce Clearing House). Thereafter, under the Prompt Payment Act, the prime contractor is allowed up to seven (7) days after its receipt of payment from the government to pay the first-tier subcontractors and each first-tier subcontractor is, in turn, similarly entitled to an additional seven (7) days after its receipt of payment within which to effect payment to the second-tier subcontractors and suppliers. 39 U.S.C. §3905(b)(1) and (c).

Thus, even assuming that no delays in the processing of payment occur for the reasons permissible under the Prompt Payment Act, payment to a second-tier subcontractor would not even be due until approximately forty-four (44) days after submission of the prime contractor's pay application to the government (i.e., 30 days + 7 days + 7 days). Furthermore, hypothetically, had the second-tier subcontractor last provided labor or materials on the 10th of the month, approximately twenty (20) days could expire after the subcontractor's last work before the prime contractor's pay application covering such work would be submitted to the government. Coupled with the forty-four day payment sequence under the Prompt Payment Act, this would mean that that second-tier subcontractor or supplier may not even be "due" payment until approximately sixty-four (64) days after it last provided labor or materials to the project.

after the date of mailing. (Indeed, in the case below there was an eleven day lapse between mailing and delivery). Thus, the point in time when the subcontractor must actually mail its written notice would be substantially earlier than the end of the ninety-day period specified by the Miller Act, perhaps even as soon as seventy to seventy-five days after its last work on the project.

As a practical matter, this will give claimants a relatively short time, perhaps as little as two weeks between when they would first reasonably expect to receive payment and when they must mail notice to the prime contractor of any non-payment. This compression of the notice period will require second-tier subcontractors to routinely mail written notice to contractors much sooner than the end of the ninety-day statutory period and result in such notices being given even before the routine payment process has been given a full opportunity to work. This proliferation of early notices of non-payment required by the Fourth Circuit's interpretation of the notice requirement will create confusion, uncertainty and delay in the payment process which will likely far outweigh any benefit to that process

contemplated by the Fourth Circuit in reaching its determination.

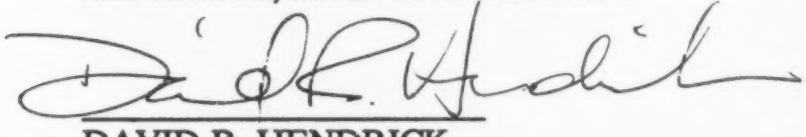
V. CONCLUSION

The impact of this decision goes far beyond the interests of the individual litigants and raises the specter of a procedural "catch 22" for the very individuals and entities the Miller Act was adopted to protect. Congress enacted the Miller Act in an effort to render the playing field on which contractors and their subcontractors settle payment disputes somewhat more level. Unless overturned by this Court, the Court of Appeals decision may deprive subcontractors of access to the field at all.

Wherefore, the *Amici* respectfully submit that a *Writ of Certiorari* should issue from this Court to the United States Court of Appeals for the Fourth Circuit and that the decision of the Court below should be reversed and the matter remanded with instruction to enter summary judgment on behalf of Petitioner.

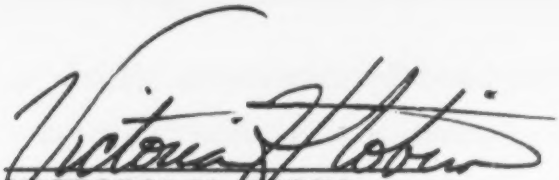
Respectfully submitted,

HENDRICK, SPANOS & PHILLIPS



DAVID R. HENDRICK

[SIGNATURE OF COUNSEL CONTINUED]



VICTORIA H. TOBIN

1410 Peachtree Center Tower
230 Peachtree Street, N.W.
Atlanta, Georgia 30303
(404) 522-1410

OF COUNSEL:

DAVID B. RATTERMAN
Goldberg & Simpson, P.S.C.
2800 First National Tower
Louisville, Kentucky 40202
(502) 589-4440